

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1326

To be argued by
JAMES P. LAVIN

United States Court of Appeals FOR THE SECOND CIRCUIT

Docket Nos. 77-1326, 77-1329

UNITED STATES OF AMERICA,

Appellee,

—v.—

FRANK MANGAN and KEVIN MANGAN,
Defendants-Appellants,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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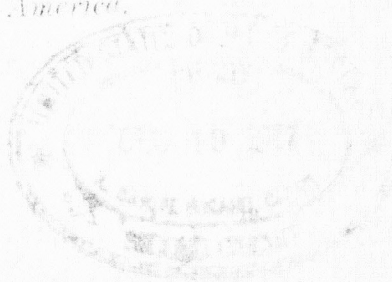


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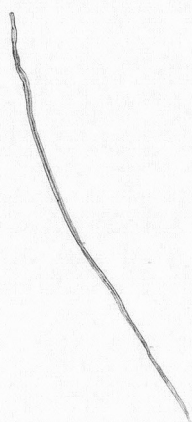
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FRANK MANGAN and KEVIN MANGAN,
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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Frank Mangan and Kevin Mangan appeal from judgments of conviction entered on July 26, 1977 in the United States District Court for the Southern District of New York after a three week trial before the Honorable Charles E. Stewart, Jr., United States District Judge, and a jury.

Indictment 77 Cr. 165, filed on March 2, 1977, charged both defendants in Count One with conspiracy to file false claims against the United States in violation of Title 18, United States Code, Section 286. Counts Two through Six charged the Mangans with using the mails to defraud in violation of Title 18, United States Code, Section 1341. Both defendants were also charged in Counts Seven through Thirteen with filing false and fraudulent income tax returns in violation of Title 26, United States Code, Section 7206(a).

Trial commenced as to both defendants on May 31, 1977 and concluded on June 20, 1977, when the jury convicted both on all counts in the indictment. On July 26, 1977 Judge Stewart sentenced the defendant Frank Mangan to a two year term of imprisonment on each of Counts One through Thirteen, the sentences to run concurrently. Kevin Mangan was sentenced to concurrent terms of imprisonment of one year and a day on each of Counts One, Two, Three, Four, Seven, Eight and Nine. Imposition of sentence on Counts Five, Six, Ten, Eleven, Twelve and Thirteen was suspended and he was placed on probation for three years, to commence upon his release from the term of imprisonment.

Both defendants are free on bail pending this appeal.

Statement of Facts

The Government's Case

1. A Summary

In 1971 Frank and Kevin Mangan devised a scheme to defraud the Internal Revenue Service of the Treasury Department ("IRS") by filing false and fraudulent personal income tax returns using names and social security numbers of legitimate taxpayers obtained from the files of the IRS by Frank Mangan, who was an IRS Revenue Agent. Frank Mangan completed seven tax returns, six in the name of John McCarthy and one in the name of Scott Murphy. Each of the seven returns claimed a refund of approximately eight to nine thousand dollars and each return was also accompanied by a fraudulent W-2 form substantiating the refund claim.

The tax returns were processed but, because one return bore an invalid social security number, only six U.S. Treasury tax refund checks were issued, totalling

\$54,944.31. The checks were mailed to the addresses shown on the returns, all of which were Manhattan rooming houses and transient hotels rented for that purpose by the defendant Kevin Mangan, who picked up five of the six checks and deposited them into four bank accounts he had opened in Westchester, the Bronx and Manhattan. The proceeds of the five refund checks which were actually cashed, \$46,068.68, were withdrawn from the banks shortly after the deposits. The defendant Kevin Mangan then gave approximately \$20,000 to \$25,000 to an unindicted co-conspirator, John Bertsch, who funneled it through his own account and later returned most of that money to Kevin Mangan.

In short, the evidence established both defendants' involvement in a conspiracy to defraud the United States.

2. Bertsch joins the conspiracy and is informed about the tax refund scheme.

John Bertsch testified that he had known Kevin Mangan since about 1966 when both worked together at a Howard Johnson's restaurant. After his release from the U.S. Army in 1971 Bertsch began working as a bartender at a concession run by Kevin Mangan in the Tall Trees Country Club in Long Island.*

In the late part of 1971 Kevin Mangan, in a series of conversations, described to Bertsch the operation of a scheme in which Kevin and his brother Frank intended getting money from the Government by filing "phony" income tax returns. Kevin Mangan stated that his brother Frank was employed by the IRS and had access to microfilm from which he would select eight or ten legitimate taxpayers whose names he would use to file tax returns in early January, 1972. By doing this, Frank

* Bertsch was named in the indictment as a co-conspirator and agreed to testify for the Government in return for being allowed to plead guilty to three misdemeanors. (Tr. 170-71).

would beat the taxpayers to their own money.* Kevin stated that he in turn was to rent apartments where the refund checks could be sent and also to open bank accounts in the names of the legitimate taxpayers. (Tr. 143-46).**

3. The scheme becomes operational.

In January and February of 1972 seven individual income tax returns were filed with the Internal Revenue Service in Andover, Massachusetts. The taxpayer's name, address and social security number given on each return, as well as the amount of refund claimed and the refund check issued, were as follows:

GX	Taxpayer	Refund Claimed	Amount of Tax Refund Check Mailed
(1)	John McCarthy 230 West 76th Street New York, New York 10023 Soc. Sec. No. 052-03-7261	\$9,201.12	\$9,201.12 (GX 23)
(2)	John McCarthy 230 West 76th Street New York, New York 10023 Soc. Sec. No. 092-12-0561	\$9,044.16	\$9,033.71 (GX 27)
(3)	John McCarthy 306 West 94th Street New York, New York 10025 Soc. Sec. No. 099-05-7576	\$8,875.63	\$8,875.63 (GX 28)

* Frank Mangan, an accountant, was employed by the IRS in Mineola, Long Island as a Revenue Agent from July, 1971 to June 28, 1972. His duties included auditing returns and, as a Revenue Agent, he had access to microfilm of taxpayers' accounts which were kept as references in the office. (Tr. 136-42; GX 8, 9, 10, 43). The names and social security numbers appearing on the fraudulent tax returns (GX 1-7), appeared on rolls of microfilm which were kept in the Mineola IRS office during 1971. The addresses were different. (Tr. 45-65; GX 11-17).

"Kevin Mangan Br." to the named appellant's brief on appeal. Exhibits; "Hr." to the minutes of the pre-trial hearings; "App" to the joint appendix of appellants; "Frank Mangan Br." and

** "Tr." refers to the trial transcript; "GX" to Government

- | | | | |
|-----|--|------------|--------------------|
| (4) | John McCarthy
306 West 94th Street
New York, New York 10025
Soc. Sec. No. 130-26-1053 | \$8,991.02 | \$8,991.02 (GX 20) |
| (5) | John McCarthy
303 West 80th Street
New York, New York
Soc. Sec. No. 134-14-8963 | \$9,421.06 | \$9,421.06 (GX 24) |
| (6) | John McCarthy
425 West End Avenue
New York, New York 10024
Soc. Sec. No. 902-08-9214 | \$8,872.04 | No CHECK MAILED * |
| (7) | Scott Murphy
2166 Broadway
New York, New York 10024
Soc. Sec. No. 169-42-8399 | \$9,421.77 | \$9,421.77 (GX 25) |

Each return was accompanied by a tax withholding form (W-2) which showed that the seven taxpayers worked for Atlas Investing Co., Inc. (GX 1, 7), Ace Industries, Inc. (GX 2, 4, 6) or Admiral Realty Co., Inc. (GX 3, 5), and that each had federal income tax withheld from his wages in amounts ranging from approximately \$12,000 to \$14,000. (Tr. 24-44, 86-101).

Later in 1972 the real McCarthys and Murphy filed their own returns and the IRS computer caught the duplicate filings. All twelve McCarthy returns were pulled for further examination. Mrs. Margaret Bruce, a tax examiner with the IRS in Andover, wrote to the addresses on the first six McCarthy returns but received no replies.

* No check was mailed in response to GX 6 since the tax return bore an invalid Social Security number (902-08-9214) which was a temporary number assigned by the IRS for internal purposes. No person outside the IRS had access to the number. (Tr. 33-36).

She did receive replies from the six true McCarthys. (Tr. 24-44).*

4. The checks are negotiated.

The addresses to which the checks were mailed during February, March and April 1972 were rooming houses and transient hotels in Manhattan. (Tr. 31, 101-106, 211-215, 1119-22). After being delivered in early 1972, five of the six refund checks were deposited into savings and checking accounts at four locations. Three refund checks were deposited with the National Bank of Westchester, at its White Plains and New Rochelle branches, into accounts opened in early 1972 in the names of Scott Murphy and John McCarthy. (GX 23, 24, 25, 21B, 21C, 22B; Tr. 118-35). A fourth check was deposited into an account opened in the name of John McCarthy at a branch of the Chase Manhattan Bank on Fordham Road in the Bronx, and the fifth check was deposited at a Chase Manhattan branch at 60 East 42nd Street in an account entitled "McCarthy Enterprises, Inc." (Tr. 136-42, 244-68, 296-34; GX 19C, 20, 27).

In all, six tax refund checks totalling \$54,944.31 were issued by the Treasury Department, five of those checks totalling \$46,068.68 were deposited and the proceeds were withdrawn in cash during March and April of 1972.**

Bertsch testified that during February, March and April of 1972 he and Kevin Mangan traveled to a number of locations in Manhattan. Once they went to an apart-

* She also tried contacting the employers shown on the fraudulent McCarthy returns, but could not locate them. (Tr. 32-33; GX 1-6). Three of the true John McCarthys testified they did not fill out GX 3, 5 and 6. (Tr. 1032-36, 1116-18, 1204-05).

** One check (GX 28) payable to John McCarthy Soc. Sec. No. 099-05-7576 at 306 West 94th Street in the amount of \$8,875.63 was not picked up and was returned to the Treasury Department uncashed.

ment where Kevin told Bertsch he was going to pick up a check. Bertsch also recalled going to two banks, one in the Bronx near an overhead "El" and another somewhere in Westchester. At the Bronx bank, Kevin Mangan entered and when he returned to the car he informed Bertsch that the plan was going according to schedule and that everything was working out the way they wanted it to. After one trip to the bank in Westchester, Kevin Mangan told Bertsch he had opened an account. Bertsch and Kevin Mangan later returned to the same bank, in February, late March or April, where Kevin withdrew a large sum of money. Bertsch recalled that on that occasion Kevin showed him a "pile of money." During one return trip from New York to Long Island Kevin Mangan showed Bertsch a Government check which Bertsch recalled was in the amount of \$8,000 or \$9,000. (Tr. 147-53).

Between February and April of 1972 Kevin Mangan gave Bertsch approximately \$20,000 to \$25,000 of the refund money. Bertsch deposited this money into a checking account which he opened for this purpose at the National Bank of North America in Levittown, Long Island. Bertsch used \$2,000 of that money for a car and clothes. In addition, Bertsch received occasional payments of \$50 to \$100 from Kevin Mangan. Kevin Mangan told Bertsch that it was his intention to use the money from the refund scheme to buy houses and he asked Bertsch to buy a house for him, giving Bertsch \$1,000 as a down payment. Bertsch did buy a house. However, he did not sign it over to Kevin as they had agreed and he returned the \$1,000. Bertsch returned the remainder of the money to Kevin Mangan mostly by check and some in cash.* The checks were payable either

* Bertsch also gave \$3,000 or \$4,000 of Kevin Mangan's money to Edward Quinn, who was to also buy a house in his name for Kevin Mangan. Quinn backed out and returned the money to Bertsch who gave it back to Kevin. (Tr. 156-57).

to Kevin Mangan, J. K. Management or Vast Industries, two corporations formed by Kevin Mangan.* Approximately \$10,000 was used to refurbish a small office building Kevin Mangan had rented (Tr. 154-159).

5. The fingerprint evidence as to Kevin Mangan.

On March 7, 1972, a corporate checking account was opened at the Chase Manhattan Bank at 60 East 42nd Street in the name McCarthy Enterprises, Inc.** The person who opened the account gave the names of James Morrow, 306 West 94th Street and Scott Murphy as references (Tr. 303-04; GX 36B, 36P, 318-26).*** One

* The bank records of Vast Industries reflected deposits of approximately \$13,000 for the period April to August of 1972. Kevin Mangan was the only person authorized to draw against this account. (Tr. 756-63; GX 55, 56, 57).

** The McCarthy Enterprises, Inc., checking account was opened on March 7, 1972 with a \$4,500 treasurer's check dated March 6, 1972 drawn on the National Bank of Westchester. (Tr. 268, 321; GX 21H). On March 15, 1972 a U. S. Treasury tax refund check dated March 10, 1972 payable to John McCarthy 230 W. 76th St., N.Y., N.Y. in the amount of \$9,033.71 was deposited into the McCarthy Enterprises, Inc. account (GX 27). On April 13, 1972 there was a transfer of \$9,015.98 from the savings account of John McCarthy at the Chase Manhattan Bank on Fordham Road in the Bronx, to the McCarthy Enterprises, Inc. account. The \$9,015.98 represented the proceeds plus interest of the U. S. Treasury tax refund check dated March 9, 1972 in the amount of \$8,991.02 payable to John McCarthy 306 West 94th Street which was deposited into the Fordham Road branch of the Chase Manhattan Bank on March 14, 1972. (Tr. 107-12; GX 20, 19). Of the \$22,549.69 deposited or transferred into the McCarthy Enterprises account, \$22,450.00 was withdrawn in cash by April 18, 1972. (GX 36G-36N).

*** Linda Rishkofski, an employee of the American Red Cross in Patchogue, Long Island, ran a nutrition program for the elderly. She identified Kevin Mangan as a person known to her as James Morrow, a Vice President of American Banquet Corporation. (Tr. 357-58).

of the documents used in opening the account was a corporate resolution in the name "McCarthy Enterprises" and was signed "John M. McCarthy" as secretary. (Tr. 301-03, 317; GX 37A, 373).^{*} The second page of the resolution (GX 37B) bore a seal. Kevin Mangan's left little fingerprint appeared on the document. (Tr. 269-81, 772-802; GX 37B, 58, 59, 60). During the Government's direct examination of its fingerprint expert, Kevin Mangan conceded that his print did appear on the resolution. (Tr. 785-86).

In addition to the corporate resolution, Kevin Mangan's fingerprints and palmprints appeared on the fraudulent return of John McCarthy, 230 West 76th Street, New York, New York, social security number 092-12-0561. (Tr. 899-90, 1316-21; GX 2, 48, 62, 63). These were also conceded to be Kevin's prints. (Tr. 1328-29).

Finally, Kevin Mangan's fingerprints appeared on two of the U. S. Treasury tax refund checks, the first being a check payable to John McCarthy, 303 West 80th Street, New York, New York, social security number 134-14-8963, in the amount of \$9,421.06, and the second being a check payable to John McCarthy, 230 West 76th Street, New York, New York, social security number 092-12-0561, in the amount of \$9,033.71. (Tr. 907-12, 1322-24; GX 24, 27, 72, 73).

^{*} Bertsch testified that sometime in early 1972 he and Kevin Mangan drove to a stationery store in Manhattan where Kevin purchased a corporation kit for what Kevin Mangan described as a phony corporation. (Tr. 153).

6. The handwriting evidence.

A. Kevin Mangan

Bertsch identified the handwriting on a group of American Banquet Corporation checks as being Kevin Mangan's. (Tr. 172-196; GX 33, 34B). Douglas Cromwell, a handwriting expert, compared the writing on those checks with the writings on a group of documents, deposit and withdrawal tickets and opening account cards from the banks in which the refund checks were deposited. (Tr. 857-62; GX 19, 19A-19D, 19C, 19D, 21, 21A-21F, 22, 22A-22D, 36A, 36B, 36D).^{*} Cromwell testified that in his opinion the "known" documents, namely, the checks identified by Bertsch as bearing the handwriting of Kevin Mangan, were written by the same person whose handwriting appeared on various bank documents. (Tr. 857-860; GX 61).

B. Frank Mangan

The Government introduced Frank and Jeanne Mangan's 1971 and 1973 personal income tax returns and excerpts from his personnel file gathered while he was employed at the IRS. (Tr. 554-56; GX 38, 40, 43). Louis Caputo, a handwriting expert, testified that he compared the writings on those exhibits with the writings on the seven fraudulent income tax returns (GX 1-7) and that it was his opinion that the writer of GX 38, 40 and 43 and the seven fraudulent income tax re-

^{*} GX 19, 19A-19D were from the Chase Manhattan branch on Fordham Road in the Bronx (Tr. 106-17); GX 21, 21A-21F were from the National Bank of Westchester's White Plains, New York branch; GX 22, 22A-22D were from the New Rochelle branch (Tr. 118-123). GX 36A, B, 36D were from the Chase Manhattan branch at 60 East 42nd Street, New York. (Tr. 244-68, 869-75; GX 61).

turns was the same person. (Tr. 556, 606-23). Caputo also testified that the fraudulent returns were all written by the same person as were Mangan's tax returns and personnel file. (Tr. 564).

7. The Frank Mangan Personal Income Tax Returns.

John Petitio, an IRS Agent, testified that the method used to obtain the large refunds on the fraudulent returns, GX 1-7, was claimed partnership losses. Petitio also examined the 1971, 1972, 1973, 1974 and 1975 tax returns of Frank and Jeanne Mangan and found that those returns also claimed similar partnership losses. (Tr. 1160-76; GX 38-42). In addition, the 1972 tax return of Frank Mangan showed a capital gains loss from the sale of securities. (GX 39). Agent Petitio analyzed the 1972 return and found that in order to purchase the stocks shown on the schedule filed with the return, Frank and Jeanne Mangan would have needed approximately \$12,000 in new capital. (Tr. 1177-82, 1216-20).

The Defense Case

Frank Mangan did not testify or present any evidence.

Kevin Mangan did not testify but did call Raymond Nazzaro who had known Kevin Mangan since 1970 and had worked with him and Bertsch at a country club on Long Island. Nazzaro recalled seeing blank forms of all types, including corporate resolutions and tax forms, in the office at the country club. Both Kevin Mangan and John Bertsch used that office and another office in Sound Beach, where there were also piles of blank forms. Nazzaro saw Bertsch handling the forms. Nazzaro, although he had seen Kevin write numerous times, was unable to identify his handwriting. Nazzaro also re-

called that March 22, 1972 was Kevin Mangan's birthday and that he and Kevin had spent that day together.* Nazzaro denied receiving \$500 from Kevin Mangan to start a business. (Tr. 1399-1440).**

ARGUMENT

POINT I

The Hearsay Declarations of Co-Conspirator Kevin Mangan Were Properly Admitted Against Frank Mangan.

Frank Mangan asserts that the independent non-hearsay evidence was insufficient to establish his membership and participation in the charged conspiracy and the trial court thus erred in admitting co-conspirator hearsay statements against him. He further claims that the hearsay declarations were in any event not in furtherance of the conspiracy and were inherently unreliable. These arguments are without substance.

A. The Non-Hearsay Evidence

The Government established at trial that Frank Mangan was an accountant employed by the IRS as a Revenue Agent during 1971 and 1972. (Tr. 136-42). As such he had access to the IRS records containing the information which later appeared on the fraudulent re-

* On March 22, 1972, \$5,000 of the refund scheme money was withdrawn from the National Bank of Westchester. (GX 21F).

** Bertsch testified that Nazzaro had received \$500 from Kevin Mangan. (Tr. 372-73).

turns. (Tr. 45-65). A handwriting expert testified that the handwriting on all the fraudulent returns was that of Frank Mangan. This alone would have been sufficient to sustain his conviction. (Tr. 557-736; GX 1-7). *Chatman v. United States*, 557 F.2d 147 (8th Cir. 1977); *United States v. Acosta*, 369 F.2d 41 (4th Cir. 1966), *cert. denied*, 386 U.S. 921 (1967); *United States v. Ehrenberg*, 354 F. Supp. 460 (E.D. Pa.), *aff'd*, 485 F.2d 682 (3rd Cir. 1973), *cert. denied*, 416 U.S. 906 (1974). In addition, an analysis of Frank Mangan's own personal income tax returns revealed that he had an unexplained expenditure of over \$12,000 in 1972, the year the proceeds from the scheme were distributed. That same analysis also revealed that Mangan claimed partnership losses on his own tax returns and that a claimed partnership loss on each of the fraudulent returns was the method employed to obtain the refunds. (Tr. 1168-89, 1217-50; GX 1-7, 38-42).*

In view of this evidence, Judge Stewart correctly found that the Government had established Frank Mangan's membership and participation in the conspiracy independent of the hearsay evidence. (Tr. 1443). *United States v. Geaney*, 417 F.2d 1116 (2d Cir.), *cert. denied*, 397 U.S. 1028 (1969); *United States v. Green*, 523 F.2d 229, 236 (2d Cir. 1975), *cert. denied*, 423 U.S. 1074 (1976); *United States v. Wiley*, 519 F.2d 1348, 1350-51 (2d Cir. 1975) *cert. denied*, 423 U.S. 1058 (1976); *United States v. D'Amato*, 493 F.2d 359 (2d Cir.), *cert.*

* In addition to the handwriting and the partnership losses, Mangan's own returns and the fraudulent returns showed striking similarities of miscellaneous fee deductions. For example, Mangan on his own returns showed deductions for "Safe Deposit," "Union Dues" and "Financial Pub" (*sic*) (GX 38, 39, 40, 41, 42); deductions for "Union Dues," "Safe Deposit" and "Financial Pub" (*sic*) were taken on two of the fraudulent returns. (GX 2, 6).

denied, 419 U.S. 826 (1974); *United States v. Manfredi*, 488 F.2d 588 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974).

B. The Hearsay Declarations

In late 1971 Kevin Mangan told Bertsch that Kevin and his brother would obtain money from the Government by filing phony income tax returns. Bertsch was told that Frank, Kevin's brother, was an employee of the Internal Revenue Service and had access to microfilm records from which Frank would pick out the names of eight or ten legitimate taxpayers and file tax returns for these people in early January to "beat these legitimate taxpayers to their own money." Kevin further stated that his role was to open phony bank accounts in the legitimate taxpayer's names and also to rent apartments in these peoples' names where the refund checks could be sent and where he would pick them up. (Tr. 143-47). At a later point Kevin stated to Bertsch that there was supposed to be a fifty-fifty split of proceeds between Frank and Kevin, but since he, Kevin, was doing most of the work he intended telling Frank that one of the checks didn't come in and in this way obtain more than half of the proceeds. (Tr. 165).

While objection was made to the admission of this testimony at trial, the objection clearly was not on the ground that the statements were not in furtherance of the conspiracy. (Tr. 72-76, 134-35, 145, 1392-3, 1443). Having failed to specify that ground below, the defendant cannot raise it for the first time on appeal. *United States v. Bennett*, 409 F.2d 888, 893 (2d Cir.), *cert. denied*, 396 U.S. 852 (1969); *United States v. Indiviglio*, 352 F.2d 276, 288-90 (2d Cir. 1965), *cert. denied*, 383 U.S. 907 (1966).

In any event, there is absolutely no basis for Frank Mangan's contention that these statements were not in

furtherance of the conspiracy. It was established beyond question at trial that Frank Mangan worked for the IRS and that fraudulent tax returns were filed, as a result of which approximately \$46,000 was paid. Bank accounts and rooming houses were also rented and most importantly, Bertsch himself participated in and accompanied Kevin Mangan in the execution of his part of the scheme.*

Moreover, the statements clearly were intended by Kevin Mangan as an explanation of the operation of the scheme and the roles of each co-conspirator in his effort to induct a prospective new member, who, in fact, thereafter joined the conspiracy. As such, the statements were also properly admissible on this additional ground as well. *United States v. Sansone*, 231 F.2d 887, 892 (2d Cir.), cert. denied, 351 U.S. 987 (1956); *United States v. Halpin*, 374 F.2d 493, 495 (7th Cir.), cert. denied, 386 U.S. 1032 (1967).**

Frank Mangan further contends that Kevin's statement to Bertsch regarding Kevin's intention to hold back some of the proceeds from Frank was "contrary to and in derogation of the purported conspiratorial agreement." (Frank Mangan Br. 18). The appellant fails, however, to understand that the purpose of the conspiracy was to defraud the United States Treasury; the fact that there is no honor among thieves, even brothers, does not, for that reason, take their actions outside the scope of the

* Frank Mangan concedes in his brief that the statements were made during the course of the conspiracy and that Bertsch later joined "the scheme". (Frank Mangan Br. 16, 18).

** Although not raised below, Kevin Mangan's statements were declarations of his intentions and as such were admissible as exceptions to the hearsay rule. Rule 802(3), Fed. R. Evid.; *United States v. Annunziato*, 293 F.2d 373, 377-78 (2d Cir.), cert. denied 368 U.S. 919 (1961), cert. denied. See also *United States v. Wiley*, 519 F.2d 1348, 1350 (2d Cir. 1975) 423 U.S. 1058 (1976); *United States v. D'Amato*, 493 F.2d 359, 363-64 (2d Cir.), cert. denied, 419 U.S. 826 (1974).

conspiracy. As this Court noted in *United States v. Finkelstein*, 526 F.2d 517, 521-22 (2d Cir. 1975), *cert. denied*, 425 U.S. 960 (1976):

That certain defendants were eager to cheat each other for a larger slice of the spoils does not obscure the unifying means used by all of them to defraud the public in the first place.

See also United States v. Salazar, 485 F.2d 1272, 1276-77 (2d Cir. 1973), *cert. denied*, 415 U.S. 985 (1974). The statements then were clearly in furtherance of the conspiracy as each knew it to be. *United States v. Doulin*, 538 F.2d 466 (2d Cir.), *cert. denied*, — U.S. — (1976); *United States v. Tramunti*, 513 F.2d 1087, 1095 n.12 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975); *United States v. Glazer*, 532 F.2d 224 (2d Cir. 1976), *cert. denied*, — U.S. — (1977); *United States v. Frank*, 494 F.2d 145, 155-56 (2d Cir.), *cert. denied*, 419 U.S. 828 (1974); *United States v. Dorfman*, 470 F.2d 246 (2d Cir. 1972), *cert. dismissed*, 411 U.S. 923 (1973); *United States v. Littman*, 421 F.2d 981 (2d Cir. 1970), *cert. denied*, 400 U.S. 991 (1971).*

POINT II

The Frank Mangan Handwriting Exemplars Were Properly Authenticated.

The defendant Frank Mangan contends that the documents used as his handwriting exemplars were not sufficiently authenticated. The Government relied on two joint tax returns signed by Frank and Jeanne Mangan (GX 38, 40) and certain forms from Mangan's personnel file at the Internal Revenue Service (GX 43) as ex-

* The statements were clearly against Kevin Mangan's penal interest when made, thus establishing their reliability. *United States v. D'Amato*, 493 F.2d 359 (2d Cir.), *cert. denied*, 419 U.S. 826 (1974).

emplars of Frank Mangan's handwriting.* Louis Caputo, a handwriting expert, testified that these three exemplars and the seven false tax returns (GX 1-7) were written by the same person. (Tr. 556-69, 606-22). Frank Mangan argues that authentication of exemplars should "not be established solely by the content of the document alone, without some additional testimony." (Frank Mangan Br. 24).** However, appellant's argument that further authentication should have been required goes to the weight rather than the admissibility of the exemplars.

The requirement of authentication "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Fed. R. Evid. 901(a). Once this threshold standard is met the question is for the jury whether the exemplars were written by the defendant. *William v. Conger*, 125 U.S. 397, 413-15 (1888); *United States v. Swan*, 396 F.2d 883, 885 (2d Cir.), *cert. denied*, 393 U.S. 923 (1968). Fed. R. Evid. 901(b) (4) provides:

"By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

* * * * *

Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances."

Under such a standard there was ample evidence for Judge Stewart to properly conclude that the exemplars

* Appellant's attorney stipulated that these exemplars came from the files of the IRS. (Tr. 473).

** While the authentication of a document may be established by its contents alone, 5 Weinstein, EVIDENCE ¶ 901(b) (4) [01] at 901-46-901-51 (1976) and cases cited therein, this case does not even present that issue.

were written by Frank Mangan. The judge was aware from prior testimony that Frank Mangan worked as a Revenue Agent for the IRS and that a portion of the exemplars (GX 43) was obtained from Mangan's personnel folder which had been retained by the IRS. Included in GX 43 were such items as an employment application partially filled out by hand, test papers, and other personal information forms, some of which bore the signature, "Frank Mangan, Jr." which Judge Stewart found to be "very similar if not the same" as the signatures "Frank Mangan, Jr." on the tax returns. (Tr. 494; GX 38-42).^{*} In addition, the addresses and social security numbers matched. (Tr. 488-89, 494; GX 38-42). After comparing the lettering on the returns with that in GX 43, Judge Stewart also found that they appeared to be the same.^{**} Furthermore, the contents and substance of the tax returns and personnel forms were of matters known only to a limited group of people which included the appellant. In addition the custody of the documents with the IRS, the place where one would reasonably expect the genuine documents to be, tends to refute the danger of forgery.

Proof of authorship can be established by direct or circumstantial evidence, *Dean v. United States*, 246 F. 568, 576 (5th Cir. 1917); *United States v. White*, 444 F.2d 1274, 1280 (5th Cir.), *cert. denied*, 404 U.S. 949 (1971), and authentication of exemplars may be established by the content of the documents alone. Appellant incorrectly relies on Wigmore for the contrary proposi-

^{*} Title 26, United States Code, Section 6064 establishes a presumption that the taxpayer, Frank Mangan, signed the returns.

^{**} In addition to his own finding, Judge Stewart was also aware that the Government's handwriting expert would so testify, as he subsequently did. (Tr. 496, 564).

tion. (Frank Mangan Br. 24).^{*} Professor Weinstein in his treatise points out that:

"Wigmore's conclusion that mere contents will not suffice to authenticate unless only the author would have known the details is contrary to the federal rules and unsound." (footnotes omitted). 5 Weinstein, EVIDENCE ¶ 901(b)(4)[01] at 901-47 (1976).

In *United States v. Liguori*, 373 F.2d 304, 305-06 (2d Cir. 1967), this Circuit upheld the authentication of certain exemplars based entirely on the character of the documents. In *Liguori* the Government's exemplars were the defendant's lease application, key application, automobile registration and chauffeur's application. An expert testified that all the standards were written by the same person who wrote the note attached to the narcotics contraband. It has consistently been recognized that the character of the documents themselves may give rise to an inference of authorship. *Dean v. United States*, *supra* (personal memo book), *United States v. Swan*, 396 F.2d 883, 885 (2d Cir.), *cert. denied*, 393 U.S. 923 (1968) (college application and registration cards); *United States v. White*, *supra* at 1280 n.4 (probation report forms).

The Government here does not rely solely on the character of the documents offered as exemplars, as was found sufficient in *Liguori*. The custody of the documents is an additional factor which tends to confirm authorship and reduce the danger of forgery or the substitution of a fraudulent document. In the instant case

^{*} Even Wigmore recognizes that a document's contents alone could authenticate its authorship where the contents reveal knowledge uniquely attributable to a single person. 7 Wigmore, EVIDENCE § 2148 (3rd ed. 1940).

counsel stipulated that the exemplars came from the appropriate IRS files. (Tr. 473).

On its facts this case is remarkably similar to the facts in *Scharfenberger v. Wingo*, 542 F.2d 328, 336-37 (6th Cir. 1976) where the identical issue arose. In *Scharfenberger* the exemplars consisted of two employee's withholding exemption certificates, a job application and a letter of resignation. Each of these documents was signed "Dr. Salb." These documents were found in the files of the Department of Correction and the Personnel Department for the Commonwealth of Kentucky. Relying on these exemplars, a handwriting expert testified that a particular "admission note" had been written by the deceased Dr. Salb. The Court of Appeals held that the exemplars had been properly authenticated since they had been taken from the State's files. The place where a document is found is relevant to the issue of authorship. *United States v. Natale*, 526 F.2d 1160, 1173 (2d Cir. 1975), *cert. denied*, 425 U.S. 950 (1976) (defendants present at place where personal notebook found); *United States v. Garelle*, 438 F.2d 366, 368-69 (2d Cir. 1970), *cert. denied*, 401 U.S. 967 (1971) (partially signed letter on defendant's person at time of arrest).

While the character, contents and custody of the documents may each standing alone support a trial court's ruling on authentication, in this case, Judge Stewart's finding was "fairly supported", *United States v. Swan*, *supra*, at 885, by the combination of all three factors.

POINT III**The District Court Properly Admitted Frank Mangan's Tax Returns Into Evidence.**

The Government introduced five of defendant Frank Mangan's own income tax returns into evidence at trial. The returns were admitted as exemplars of Frank Mangan's handwriting. In addition, they illustrated that the distinctive array of deductions which appeared on the fictitious returns also appeared on Mangan's own tax forms.* Frank Mangan objected to the admission of the returns on the ground that such disclosure would violate the Tax Reform Act of 1976, Pub. L. 94-955, § 1202, 90 Stat 1520, 1667 (amending 26 U.S.C. § 6103 (1970)).

In rejecting the defendant's novel claim, the District Court properly relied on 26 U.S.C. § 6103(h), as amended by the new statute, which specifically provides that a tax return "may be disclosed in a Federal or State judicial or administrative proceeding pertaining to tax administration . . ." where the taxpayer is a party to the proceeding, § 6103(h)(4)(A), or where "the treatment of an item reflected on such return is directly related to the resolution of an issue in the proceeding . . .," § 6103(h)(4)(B).

Section 6103(h)(4) entirely disposes of Mangan's claim. Not only was Mangan a party to the proceeding,—alone sufficient under 6103(h)(4)(A)—but the treatment of partnership loss and safe deposit rental deductions on Mangan's returns was "directly related to the resolution of an issue at trial" under § 6103(h)(4)(B) because of its striking similarity to the fictitious returns.

In an effort to avoid this clear result, defendant Frank Mangan contends that § 6103(h)(4) is inapplicable to his criminal prosecution because his trial did not pertain

* The 1972 return was also used as evidence of Frank Mangan's \$12,000 stock purchases in 1972. (GX 39).

to "tax administration." Instead, Mangan asserts that the admissibility of returns in his case is governed by the more stringent requirements provided in § 6103(i) for disclosure of returns in "nontax" matters.* To support

* In contrast to the provisions of § 6103(h) relating to tax-related cases, § 6103(i)(1) of the amended statute provides that a taxpayer's return may be disclosed to a United States Attorney and others engaged in a non-tax investigation only upon the grant of an ex parte order by a district court judge, who must make certain specified findings, and only if an application for such an order is authorized by the Attorney General, Deputy Attorney General or an Assistant Attorney General. In addition, under § 6103(i)(4), such return may be introduced into evidence at the non-tax proceeding only if the presiding judge makes a further finding that it is probative of an issue related to guilt (and not simply impeachment of a witness' credibility).

Since the District Court made the latter finding required by § 6103(i)(4), (Tr. 500, 532), the defendant's only claim of non-compliance with § 6103(i) is that his returns were obtained by the prosecutor without the court order required by § 6103(i)(1). The District Court ruled that the latter claim, namely, that the Government had obtained evidence unlawfully, was waived by the defendant's failure to raise it in advance of trial by motion to suppress. (Tr. 545). The Notes of the Advisory Committee on Rule 12 of the Fed. R. Crim. P. confirm that the trial judge's ruling was correct:

Subdivision (b)(3) makes clear that objections to evidence on the ground that it was illegally obtained must be raised prior to trial. . . . It seems apparent that this principle should apply *whatever the claimed basis* for the application of the exclusionary rule of evidence may be. (Emphasis added). 62 F.R.D. 271, 288-89 (1974).

In this case the defendant was provided copies of his returns and was advised well in advance of trial of the Government's intention to introduce them. (Tr. 542). Thus, to the extent the defendant challenges compliance with § 6103(i)(1), which governs the manner in which the Government obtains returns in non-tax cases, as distinguished from § 6103(i)(4), which essentially sets out a rule of evidence governing admissibility of returns in non-tax proceedings, his claim should have been raised before trial to allow the Government an opportunity to investigate an alternative method of proof.

[Footnote continued on following page]

his view, the defendant relies principally on the inclusion in the indictment of charges based on the false claims and mail fraud statutes, 18 U.S.C. §§ 286, 1342, as well as charges under the tax code. Mangan's position is completely untenable.

Section 6103(h)(4) of the amended statute defines the term "tax administration" to include "the administration, management, conduct, direction and supervision of the execution and application of the internal revenue laws or related statutes . . ." and "includes assessment, collection, enforcement [and] litigation . . . under such . . . statutes" (emphasis added.) Certainly, had the indictment been confined to the charges brought under § 7206(a) of the Internal Revenue Code contained in Counts Seven through Thirteen, there could be no argument that the prosecution did not pertain to "tax administration." Nonetheless, the remaining counts of the indictment pertained to the execution of the laws of the internal revenue system no less than did the tax counts, for each charged a fraud perpetrated on the Internal Revenue Service bot-tomed on the defendants' submission to that agency of false, fraudulent and fictitious income tax returns.

It is inconceivable that the Government's decision to prosecute the defendant for his tax-based criminal scheme not only under the tax code but also under other applicable statutes somehow converted a "tax administration" prosecution into a "non-tax" matter. Yet that is the result sought by the defendant. Indeed, he goes so far as to contend that "the scheme itself did not involve taxes. It

Finally, Section 6103(i)(4) specifically provides that "[t]he admission into evidence of any return or return information contrary to the provisions of this paragraph shall not, as such, constitute reversible error upon appeal of a judgment in such proceeding." Consequently, even if the defendant's prosecution is deemed a non-tax matter, the remedy provided for in the statute to redress any non-compliance with § 6103(i) is a suit for civil damages under § 7217, not a reversal of his conviction.

was, rather, a scheme for making false claims which happened to be submitted to the Internal Revenue Service." (Frank Mangan Br. 30). It is no less tortured—and no less whimsical—to contend that a tax is not a tax, but simply a payment for services which happens to be submitted to the Government.

Simple common sense confirms that Congress did not have the present case in mind when it determined to place further limits on access to tax information in connection with non-tax criminal investigations. This is not the case, envisioned by Congress, *see* S. Rep. 94-938, 94th Cong., 2d Sess. 327, *reprinted in* [1976] U.S. Code Cong. & Ad. News 3439, 3756-57, in which the Government prosecutor solicits tax information to provide leads to assist a non-tax investigation in which the Internal Revenue Service has not participated and has no interest. To the contrary, this is a case in which the investigation was performed in the first instance by agents of the Internal Revenue Service, one of the suspects was an employee of the Internal Revenue Service, and the crime involved a fraud perpetrated directly on the Internal Revenue Service. Far from the prosecutor seeking the assistance of the Internal Revenue Service, the Internal Revenue Service referred this matter to the United States Attorney on its own motion. (Tr. 535) *

* Since the defendant Mangan's tax returns were provided to the United States Attorney's Office by the Internal Revenue Service as part of its referral of the matter for prosecution, that disclosure of the returns—a step distinct from their use at trial and subject to a separate statutory provision—was perfectly proper. Sections 6103(h)(2) and (3) provide that the IRS may, on its own motion, disclose tax returns to a United States Attorney for his use in preparing for a court proceeding involving tax administration in which the taxpayer is a party, where the matter has been referred to the United States Attorney by the Secretary. The latter term is defined to provide for the broadest possible delegation of such power to subordinate IRS officials by the Secretary of the Treasury, 26 U.S.C. § 7701(a)(11)(B), (a)(12)(A), as amended by Pub. L. 94-455, § 1906, 90 Stat. 1520 at 1832-33, and therefore encompasses the referral made in this case.

Thus, this case does not require the Court to determine whether the disclosure provisions of the Tax Reform Act are to be interpreted narrowly or broadly; under any view of the statutory text, a prosecution of a corrupt IRS employee who steals taxpayer information from IRS files and then uses such information to prepare and file false and fictitious tax returns in an effort to defraud the IRS must be a matter "pertaining to tax administration."

Accordingly, the admission at trial of the defendant Frank Mangan's tax returns is governed by 26 U.S.C. § 6103(h)(4)(A), (B), and the District Court acted properly in receiving the returns into evidence.

POINT IV

The Evidence Relating to Frank Mangan's Purchase of Stock during the Year He Received the Proceeds of the Refund Scheme Was Proper.

Frank Mangan's last argument on appeal is that his conviction must be reversed because the Government was improperly permitted to establish through an analysis of his 1972 and 1973 personal income tax returns that he had purchased approximately \$12,000 in stocks during 1972. This evidence was adduced through the 1971, '72, '73, '74 and '75 personal income tax returns of Frank and Jeanne Mangan, (GX 38-42), which were analyzed by IRS Revenue Agent John Petito. Specifically, Revenue Agent Petito concluded that in order to finance the purchases of securities as shown on the schedules attached to the '72 and '73 returns, Frank and Jeanne Mangan would have required approximately \$12,000 in additional capital during 1972. (Tr. 1176-87, 1217-19; GX 78). Contrary to Frank Mangan's contention, the evidence was properly admitted.

At the outset it must be remembered that questions of the admissibility of evidence are entrusted to "the discretion of the trial court, the exercise of which may be overturned on appeal solely upon a showing of clear abuse of that discretion." *United States v. Corr*, 543 F.2d 1042, 1051 (2d Cir. 1976); see *Hamling v. United States*, 418 U.S. 87, 124-25, 127 (1974); *United States v. Catalano*, 491 F.2d 268, 273 (2d Cir.), *cert. denied*, 419 U.S. 825 (1974). Under the Federal Rules of Evidence, Rule 401 defines relevant evidence as evidence having "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Of course, under Rule 402, relevant evidence is generally admissible.

Clearly, the District Court here did not abuse its discretion in admitting this evidence that certainly tended to prove Frank Mangan's guilt of the crimes charged. As Frank Mangan notes in his brief it is clear that evidence of "sudden acquisition of large amounts of money is . . . admissible to prove criminal misconduct when pecuniary gain . . . is the motive." (Frank Mangan Br. at 37). *United States v. Jackskion*, 102 F.2d 683, 684 (2d Cir.), *cert. denied*, 307 U.S. 637 (1939); *United States v. Tramunti*, 513 F.2d 1087, 1105 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975). *United States v. Falley*, 489 F.2d 33, 38-39 (2d Cir. 1973). The evidence here established that over \$46,000 was obtained from the scheme and that Frank Mangan was to receive half of that amount. (Tr. 165). It was proper for the Government then to show through the income tax returns that in the year the proceeds would have been received he purchased with new capital over \$12,000 of stock. (Tr. 1176-87, 1217-19; GX 38, 39, 78). *United States v. Falley, supra*.

The court's holding in *United States v. Falley, supra* at 39, makes it clear that the absence of a showing of a

defendant's prior impecunity goes to the weight of evidence and not to its admissibility. *United States v. Goldenstein*, 456 F.2d 1006 (8th Cir. 1972), *cert. denied*, 416 U.S. 943 (1974); *United States v. Rouse*, 494 F.2d 45 (5th Cir. 1974); *United States v. Cavallino*, 498 F.2d 1200, 1205-06 (5th Cir. 1974); *United States v. Mirenda*, 443 F.2d 1351, 1357 (9th Cir.), *cert. denied*, 404 U.S. 966 (1971). Even if there were such a requirement, it was clearly established that Frank Mangan and his wife did not possess the financial resources sufficient to expend \$12,000 to purchase stock in 1972. After deductions for expenses and losses the Mangans claimed that they had taxable income of approximately \$10,700 in 1971 and that they had no taxable income in 1972.* Furthermore, the Mangans showed interest income of \$91.76 for 1971 and \$61.02 for 1972 from which the jury could infer that no savir were available to explain the \$12,000 stock purchase in 1972. (GX 38, 39). These two returns more than sufficiently established that the acquisition of \$12,000 in 1972 was both "sudden" and unexplained.

In addition, Frank Mangan's claim that the \$12,000 figure was misleading because the purchases could have been made on margin is pure speculation. No such proof was offered at trial. *United States v. Hinton*, 543 F.2d 1002, 1012-13 (2d Cir. 1976), *cert. denied*, — U.S. — (1977).** Furthermore, these arguments were brought out during Agent Petito's cross-examination (Tr. 1220-40) and again were matters for the jury to consider in weighing the evidence. *United States v. Tramunti*, *supra*.*

* Their 1971 and 1972 tax returns showed gross income before deductions as \$20,648.67 and \$18,597.93, respectively.

** No deduction for margin account interest was taken on the 1972 return although such deductions were taken on the 1973 and 1975 returns. Furthermore, although the returns did show large deductions for personal loan interest, the defendant chose not to bring that fact to the jury's attention. (Tr. 1610-16) (Tr. 1044-48; GX 39, 40, 42).

POINT V**Kevin Mangan Was Not Prejudiced by the Fact That the Government Did Not Make Blow-Ups of All the Fingerprint Evidence.**

Kevin Mangan's first argument on appeal is that his conviction should be reversed because a Government fingerprint expert could not be cross-examined in the absence of blow-ups about the reasons for his conclusion that Kevin Mangan's fingerprints were found on two of the tax refund checks. He claims that he was thus deprived of the right of confrontation as guaranteed by the Sixth Amendment. The argument attempts to raise to a constitutional level matters which merely go to the weight of the evidence.

Police Officer Zachary Levin, a fingerprint expert in the Police Department, in addition to identifying Kevin Mangan's fingerprints on one of the fraudulent tax returns, testified that Kevin's prints also appeared on two of the tax refund checks. No blow-ups were prepared on the latter prints. (Tr. 908-11, 1322-23; GX 24, 27, 72, 73).^{*} As to these prints for which there were no blow-

^{*} Roy McDaniel, an FBI fingerprint expert testified earlier that a fingerprint of Kevin Mangan was on the corporate resolution used in opening an account at the Chase Manhattan Bank under the name McCarthy Enterprises, Inc. (Tr. 765-84; GX 37B, 47, 60). During McDaniel's direct testimony Kevin Mangan conceded that his print appeared on the resolution. (Tr. 785-86). Officer Levin found Kevin Mangan's fingerprints and palmprints on one of the fraudulent returns and on a W-2 form attached to that return. (Tr. 906-08, 1316-21, 1324-33; GX 46, 48, 62, 63, 79). The defendant also conceded that his prints were on these documents. (Tr. 1328-29). The FBI expert had prepared a blow-up of the latent print on the corporate resolution for comparison with Kevin Mangan's fingerprint, (Tr. 782-86; GX 60), and Officer Levin prepared a blow-up chart of the latent print on the W-2 form. (Tr. 1324-28 GX 79).

ups, Officer Levin was asked a series of questions on cross-examination which assumed as a premise that there were dissimilarities between the latents and Kevin Mangan's fingerprints. For example, Levin was asked the following:

"Did you notice that on Government's exhibit 72 which you testified was the latent index on the back of the check, the left index . . . that the left index of Kevin Mangan compared positively with the left index of the latent, that to the left of the core on the latent impression, counting from the core loop, the central loop the third and fourth ridges join in a bifurcation but that on the inked impression of the left index there is merely an ending ridge and no bifurcation? Did you notice that?"

To which Levin responded:

"When I made my comparison at the office and I positively identified the latent prints with the inked fingerprints, that there were no dissimilarities between the latent print and the inked print." (Tr. 1348-49).

Levin was asked similar questions and his answers were the same, namely, that he had found no dissimilarities, that he could not perform a detailed analysis because he had no blow-ups, and that he was unable to use the magnifying glass of the type handed to him by defense counsel in court because

"We use a special type glass manufactured by the Faurot Company and the examinations are made at our office under ideal conditions, lets say, with desk lamps and this particular fingerprint glass." (Tr. 1351).

After this, Kevin Mangan's attorney passed the latents together with Kevin Mangan's prints to the jury and re-

quested them to compare both, using his magnifying glass as an aid. Kevin Mangan now characterizes this exchange as a refusal by Officer Levin to be cross-examined.

Having somewhat lessened, we imagine, the impact of Levin's testimony by establishing to the jury that without blow-ups Levin could not go into detail as to his reasons for his positive identification and further that he could not reexamine the prints under courtroom conditions, Kevin Mangan contends that that even more effective cross-examination could have been obtained had Officer Levin prepared blow-ups. The argument assumes that Levin would have altered his testimony once he enlarged the prints. However, it must be remembered that the expert did not require enlargements to do his analysis and reach his opinion. Indeed, Levin returned to his office during the luncheon recess, reexamined the prints on the checks and on re-direct examination reconfirmed his original, positive, conclusion that Kevin Mangan's prints were on the checks and that there were no dissimilarities as Kevin Mangan's attorney had implied during cross-examination. (Tr. 1376, 1381-90).*

In arguing that the absence of blow-ups deprived him of the right of confrontation, Kevin Mangan fails to

* In *United States v. Durant*, 545 F.2d 823 (2d Cir. 1976), this Court reversed the conviction of a defendant who was refused appointment of a fingerprint expert under the Criminal Justice Act by the trial court. The docket sheet in this case reflects that the defendant Kevin Mangan had an independent fingerprint expert appointed on his behalf by the court prior to trial. (App. at "A"). The defense expert was never called at trial and, we submit, it is inconceivable that he would not have been called had his examination resulted in a finding contrary to officer Levin's testimony. If his analysis, assuming one was performed, agreed with the Government's findings, we fail to see how Kevin Mangan's attorney could have had a good faith basis for implying in his questioning and suggesting in his summation that there were "problems with those prints." (Tr. 1561).

understand it is the "expert's testimony [which] is the evidence, not the prints, for the prints could not be understood of themselves by the jury." II Wigmore, *Evidence* § 414a (3rd Ed. 1940). The expert, Levin, testified and was subject to full cross-examination and any weakness in his opinion revealed by that cross-examination went to the weight of the evidence and not its admissibility.* *Polk v. Ford Motor Co.*, 529 F.2d 259, 271 (8th Cir. 1975), *cert. denied*, 426 U.S. 907 (1976); See also *Tarlowe v. Metropolitan Ski Slopes*, 28 N.Y. 2d 410, 322 N.Y.S. 2d 665 (1971) (Construing Rule 4515 of the CPLR, which is substantially similar to Rule 705 Fed. R. Evid., as not requiring an expert to state any reasons for his opinion). Having fully cross-examined the expert, Kevin Mangan cannot claim that he was denied his Sixth Amendment right of confrontation. See *United States v. Sewar*, 468 F.2d 236 (9th Cir. 1972), *cert. denied*, 410 U.S. 916 (1973); *United States v. Kaufman*, 429 F.2d 240, 246 (2d Cir.), *cert. denied*, 400 U.S. 925 (1970); *United States v. Duffy*, 454 F.2d 809 (5th Cir. 1972); *United States v. Hickman*, 426 F.2d 515, 519 (7th Cir.), *cert. denied*, 402 U.S. 966 (1971).**

* Kevin Mangan's claim that the court should not have instructed the jury that the fingerprint examiners were experts is specious. Both McDaniels and Levin were fully qualified and no objection was raised to their qualifications. Judge Stewart instructed the jury that although they were experts, the jury could reject their opinions if it saw fit to do so. (Tr. 774-77, 1316-17, 1673-74), *United States v. Bermudez*, 526 F.2d 89 (2d Cir. 1975), *cert. denied*, 425 U.S. 970 (1976).

** Equally without foundation is the claim that the Government failed to meet its discovery obligation with respect to the fingerprints. (Kevin Mangan Br. 50-52). Although requested well in advance of trial, the originals of five of the tax refund checks including the two bearing Kevin Mangan's fingerprints (GX 24, 27) were not located in the Treasury Department files until May 20, 1977. They were picked up in Washington, D.C. and delivered to Detective Smith of the New York City Police Department's Latent Print Unit on the same day. (Tr. 87-100, 87-80; GX 20,

[Footnote continued on following page]

POINT VI

The Checks Used As Exemplars Of Kevin Mangan's Handwriting Were Not Obtained As A Result Of Government Misconduct And Were Properly Received In Evidence At Trial.

The "known" exemplars used by the Government's handwriting expert, Douglas Cromwell, were checks of the American Banquet Corporation (Tr. 803-05, 851-76; GX 33, 34A, 34B) in Kevin Mangan's handwriting which John Calandra and Lewis DeMott, two former business associates of Kevin Mangan, had taken from Kevin Mangan's office without permission in May of 1976. In November of 1976 the checks and documents were turned over by Calandra and DeMott to the Suffolk County District Attorney's Office which in turn provided them to the IRS in January of 1977. Kevin Mangan argues that law enforcement's participation, encouragement, receipt and use of those checks was in violation of his Fourth and Fifth Amendment rights against invasion of privacy and to due process of law. In view of the evidence adduced at a four day suppression hearing prior to trial, the claim that a Government agency participated in or encouraged

23, 24, 25, 27, 28). Detective Smith processed the checks for prints and made photographs of the checks which had latent prints of value, which were forwarded to Police Officer Levin of the identification unit on May 25, 1977. (Tr. 889, 908-11; GX 69-73). On May 31, 1977, Levin identified the prints on two of the checks as Kevin Mangan's. Kevin Mangan was informed of this on the same day and on June 1, 1977 was furnished with photographs of the prints. (Tr. 68-72). Police Officer Levin did not testify regarding his identification of Mangan's prints on the checks until June 15, 1977, *two weeks* after defense counsel was informed of the identification and provided copies of the latent prints. The claim then of non-compliance with discovery obligations is totally meritless, as is the suggestion that Kevin Mangan was somehow prejudiced by the trial court's refusal to grant a continuance. (Tr. 203-09).

the "theft" of those checks is based on a blatant distortion of the record.

The Hearing

John Calandra testified that in 1973 he became associated with Kevin Mangan as a partner in a messenger service business which had offices at 4020 Hempstead Turnpike on Long Island. Calandra and Kevin Mangan had a falling out over business matters and Calandra, in an attempt to get records to support his cause, went on some three occasions in May of 1976 to the offices and removed records. On the first occasion he was accompanied by Louis DeMott another business associate who also had a grievance against Kevin Mangan believing that he had been swindled out of \$20,000. The records that were taken from the offices by Calandra and DeMott were stored in DeMott's garage until they were taken by both to the Suffolk County District Attorney's Office. Calandra, DeMott and, indeed, every other witness at the hearing testified that Calandra and DeMott acted on their own in removing the records and not at the behest of or on behalf of anyone, including any governmental agency. (Hr. 1-13, 156-58, 207, 225-27, 234-36, 270, 307-313, 410, 423-26, 395, 433, 453-64, 476, 489). At the conclusion of the hearing Judge Stewart denied the motion to suppress in an oral opinion and found that no law enforcement officers had prior knowledge nor did they participate in the removal of the records from Kevin Mangan's office. (Hr. 534-39).

In spite of the overwhelming evidence at the hearing and Judge Stewart's findings in accordance with that evidence, in a blatant distortion of the record Kevin Mangan claims that:

According to DeMott and Calandra, the Suffolk County DA's office *prior* to the theft encouraged them to "do anything" to get ABC documents; they

broke into appellant's office with the intention of stealing the documents for the DA, and after the theft the DA's office took the documents with knowledge of the theft . . . and further encouraged Calandra that his actions were helpful and valuable to them and they could use additional materials in their ongoing investigation of ABC, after which Calandra returned to the offices and took additional documents and supplied them to the DA. At the very least the Suffolk DA was engaged in a conspiracy to receive stolen documents and in actual receipt of stolen documents; they encouraged the theft and received its proceeds with actual or constructive knowledge of the theft, and expressed a stake outcome. (Kevin Mangan Br. 58-59). (Emphasis added).

Incredibly, the defendant Kevin Mangan bases the claim that a Suffolk County District Attorney had *prior* knowledge of the break-in on a statement at the hearing by DeMott that he spoke to the District's Attorney's Office about this matter in 1974.* (Kevin Mangan Br. 57; Hr.

* Kevin Mangan states in his brief that Calandra received encouragement from the Suffolk County law enforcement personnel to return to get records. A reading of the testimony he offers (Hr. 202) in support of that claim further illustrates the distortion rampant in his brief.

Q. You had communications with McCready and Marcheschi throughout this period of time. After your initial interview you went back on several occasions. What was the purpose of going back?

A. Going back where?

Q. To McCready and Marcheschi, going back to their office the five or seven times that you went there.

A. I gave them as much information as I had, or found out.

Q. Did they encourage you to do?

A. They didn't discourage me.

Q. Did they say it would be helpful, valuable, they could use whatever you would get?

A. They didn't say so in so many words. That is the impression I got. (Hr. 202).

384-85, 418). Yet it is clear from DeMott's later testimony on the same day that he in fact was mistaken and had spoken for the *first* time to the Suffolk County authorities *after* the records were taken in May of 1976. (Tr. 307-13, 393-401). Moreover DeMott and Calandra specifically and without contradiction testified that the documents were not taken at the direction of any law enforcement official nor did law enforcement officials know about it prior to May of 1976. (Hr. 1-84, 107-54, 190-232, 380-274). Kevin Mangan further states in his brief that

After Calandra brought the documents to the Suffolk DA he told him about the break-in, and they told him he was being helpful and valuable and they could use whatever he obtained (Hr. 202) after which Calandra went back and got for the DA additional documents (Hr. 199, 202, 227-28). (Kevin Mangan Br. 57).

Again the record is clear that Calandra never returned to Kevin Mangan's offices to get documents at the request of any law enforcement authority. After May of 1976, Calandra returned on his own and found credit card receipts in a garbage can in the rear of the offices at 40-20 Hempstead Turnpike, not from the office itself. (Hr. 193-96, 200, 202, 225-29).

Clearly then as Judge Stewart found there was no governmental participation or prior knowledge of Calandra's removal of the documents from Kevin Mangan's office and thus no unconstitutional conduct by law enforcement officers which would give rise to any Fourth or Fifth Amendment claim.* *Coolidge v. New Hampshire*, 403 U.S.

* Kevin Mangan's attempt to impugn sinister motives to the Nassau County authorities in deciding not to prosecute Calandra for burglary is frivolous. The District Attorney reviewed the evidence and felt the entire matter was civil in nature. (HR 470-88, 498-99).

443, 487-88 (1971). Since the checks were obtained by private persons not acting at the request of any governmental authority they were properly admitted as evidence at trial. *Burdeau v. McDowell*, 256 U.S. 465, 475-76 (1921); *United States v. McGuire*, 381 F.2d 306, 313 n.4 (2d Cir. 1967), *cert. denied*, 389 U.S. 1053 (1968); *United States v. Capra*, 501 F.2d 267, 272 n.4 (2d Cir. 1974), *cert. denied*, 420 U.S. 990 (1975); *United States v. Mekjian*, 505 F.2d 1320, 1327, 1328 (5th Cir. 1975); *United States v. Sherwin*, 539 F.2d 1, 7-8 (9th Cir. 1976).

POINT VII

The Trial Court's Rulings in Connection with the Handwriting Evidence Were Entirely Correct.

With respect to the handwriting evidence introduced through the Government's expert, Douglas Cromwell, defendant Kevin Mangan charges the trial judge committed error on three occasions: when the trial judge refused to admit in evidence as exhibits charts from a handwriting treatise, when during deliberations he refused to send to the jury certain models used for handwriting exemplars, and when he refused to admonish the prosecutor regarding certain statements. As shown below, the claims are without merit.

First, defendant argues that during cross-examination of the Government's handwriting expert the court should have admitted as exhibits copies of charts taken from treatises on handwriting. Instead of admitting the charts as exhibits in evidence, Judge Stewart carefully followed the dictates of Rule 803(18), Fed. R. Evid., by permitting the jury merely to view the charts as they were being

discussed.* Not only was this ruling in total accordance with Rule 803(18), but moreover, since the jury never requested the charts during its deliberations, it made no difference that they were not received as exhibits in evidence.

Kevin Mangan also complains that the trial court abused its discretion in not sending into the jury room models that the defendants had been instructed to use in making handwriting exemplars. In response to the jury's request for "Kevin and Frank exemplars" (Tr. 1680), the court sent into the jury the exemplars only, refusing to send in the models. The law is clear that the interpretation of jurors' requests for evidence is "committed to the sound discretion of the trial judge." *United States v. Price*, 447 F.2d 23, 31 (2d Cir.), cert. denied, 404 U.S. 912 (1971); *United States v. Stone*, 472 F.2d 909, 914 (9th Cir. 1973); *United States v. Desist*, 384 F.2d 889, 904 (2d Cir. 1967), *aff'd*, 394 U.S. 244 (1969). Judge Stewart's interpretation of the jurors' request for the "Kevin and Frank exemplars" was completely reasonable. He declined to send in the models because the jury simply had not asked for them.** (Tr. 1681).

* Rule 803(18) reads as follows:

Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of his'ory, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. *If admitted, the statements may be read into evidence but may not be received as exhibits.* (Emphasis added.)

** The correctness of Judge Stewart's interpretation of the request was confirmed one hour later when he addressed the jury in open court as follows:

[Footnote continued on following page]

The Court: Let me ask you this: Have we been responding to your notes correctly?

The Forelady: Yes.

(Tr. 1688).

Moreover, defendant's argument concerning the placement of the small "c" in the word "McCarthy" in the model and handwriting exemplars was not well founded in the record, as demonstrated in the following exchanges between defense counsel and the handwriting witness:

A. He certainly does show the ability to write the [capital] C above the M like he does in the questioned writing.

Q. Only because he was copying from the first writing.

Mr. Lavin: Objection Your Honor.

(Tr. 997-98).

* * * *

Q. I said he was following the direction to copy exactly what appears on the model, Mr. Cromwell. If he were told to do that and the C appeared up there, if he were following the direction, he would put the C up there wouldn't he?

A. If he was following directions exactly to the letter which very few people ever do, yes.

Q. That was the instruction given to him and I was there—

Mr. Lavin: Objection, your Honor.

(Tr. 999).

* * * *

A. You are taking into consideration there that, first of all, Mr. Mangan, if that's his name started out to copy what was given to him and then reverted to his natural writing.

Another possibility is that he started to write in his normal handwriting, then started disguising it.

Q. This is not a possibility.

A. Why not?

Q. It is not a possibility because he was told to copy and because you testified earlier today that the unconscious habits of somebody will appear in the latter part of a writing, and—

A. Most of the time, yes.

Q. And except for that one first section, he puts that "c" at the line.

A. Wait a minute now, wait a minute—

[Footnote continued on following page]

Regarding the third instance of claimed error we agree with defendant Kevin Mangan that the matter "hardly needs argument." (Kevin Mangan Br. 64). The first remark complained of arose when the Government discovered that a chart it was going to offer in evidence included a check as an example of known handwriting which check had apparently been misplaced either before or after the "knowns" had been identified in court. Thus, the check was deleted prior to the chart's being offered in evidence. On voir dire defense counsel questioned the witness concerning the check rather than the chart. The following colloquy, in which defense counsel asserted that the check in question had not been among the checks identified in court as a "known", is evidently the basis for defendant's claim that the prosecutor accused counsel of "chicanery and falsification of evidence." (Kevin Mangan Br. 63).

* * * * *

Mr. Stern: This was not among the ones he identified in court, Your Honor, which would——

Mr. Lavin: Are you positive about that, Mr. Stern?

Mr. Stern. Yes, I am.

Mr. Lavin: How many times have you had that check out on your desk? (Tr. 938).

Q. Let me ask you this——

A. Let me finish.

I said that a normal writing habit that anybody normally does, if a person is really disguising, camouflaging their handwriting, if it is going to come out at all in the request writing it will probably come out at the end. I have seen people write seven, eight, ten pages of handwriting totally disguised, and it never reverts to normal handwriting.

(Tr. 1015-16).

An examination of the record shows that the argument that the prosecutor made improper accusations is nothing more than a boot strap argument based upon defense counsel's remarks. Shortly after the remarks were made, defense counsel characterized the remarks of the prosecutor as follows:

Mr. Stern: That is correct. But the jury heard Mr. Lavin say, "I don't know maybe it was in the pile but it got taken out of the pile somehow because you, Mr. Stern, were looking through them." (Tr. 941).

Defense counsel similarly distorted the remarks of the prosecutor at p. 939 and again at p. 942. Judge Stewart carefully considered the matter and apparently perceived these distortions, for he found that the prosecutor had not made the accusations attributed to him by defense counsel. (Tr. 941, 942, 946, 947).

The Court: He only said that the papers were passed around, and I noticed that at the time, from counsel to counsel, shuffled around quite a bit.

* * * * *

I don't think there was any insinuation by Mr. Lavin that you did anything improper. (Tr. 942).

To conclude the matter, the court gave the jury a lengthy instruction to the effect that the check in question was not in evidence and not to be considered by the jury as a "known" document and that remarks of counsel and of the court were not evidence. (Tr. 945-46).

The other remark about which defendant complains was occasioned by defense counsel's attempt to display to the jury a chart which had not been marked for identification, had not been received in evidence, and for which no ruling had been made by the judge permitting defense

counsel to display the chart to the jury. Under the circumstances, the prosecutor's remark—"not in this courthouse you can't" (Tr. 1024)—was completely understandable.

POINT VIII

The Indictment May Not Be Attacked For Inadequate Evidence. In Any Event, the Evidence of Mailing Was Sufficient And The Indictment Is Not Duplicious.

Defendant Kevin Mangan requests dismissal of the mail fraud counts on the ground of insufficient evidence of mailing both before the grand jury and at trial. He argues further that the mail fraud counts are duplicative of the counts under Title 26, United States Code, Section 7206. The claims have no basis in fact or law.

The Supreme Court has made clear that "an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence . . ." *United States v. Calandra*, 414 U.S. 338, 345 (1974). See also *Costello v. United States*, 350 U.S. 359, 363 (1956) and *United States v. Wyler*, 487 F.2d 170 (2d Cir. 1973). Thus, defendant's argument that the mail fraud counts should be dismissed for lack of sufficient evidence before the grand jury is defective as a matter of law.* In any

* Moreover the motion below on this ground was untimely under Rule 12(b)(2), Fed. R. Crim. P., having been made eight days commencement of trial. (Tr. 550-54). *United States v. McGrath*, 558 F.2d 1102, 1105-06 (2d Cir. 1977); *United States v. Blitz*, 533 F.2d 1329, 1344 (2d Cir.), cert. denied, — U.S. — (1977); *United States v. Kahn*, 472 F.2d 272, 283 n.9 (2d Cir.), cert. denied, 411 U.S. 982 (1973).

event Judge Stewart reviewed the grand jury minutes and found the evidence of mailing sufficient. (Tr. 1292-93).

Defendant's effort to liken this case to *United States v. Estepa*, 471 F.2d 1132 (2d Cir. 1972) involves gross exaggeration. The facts of this case and *Estepa* are hardly similar. No evidence was shown that the Grand Jury was misled in any way or that any probability existed that the grand jury would not have indicted had it had eyewitness testimony regarding mailing. *United States v. Estepa*, *supra* at 1137. Judge Stewart properly denied this claim as well. (Tr. 1292).

The evidence of mailing at trial was more than sufficient and far surpassed that in *United States v. Robinson*, 545 F.2d 301 (2d Cir. 1976). In *Robinson*, the Government introduced evidence that checks had been issued, that the intended recipients always received checks by mail, and that the checks in question were not received. 545 F.2d at 303. This Court held that evidence insufficient to permit an inference of mailing. 545 F.2d at 304. In this case the Government's proof included disbursement sheets showing the mailing of the checks (Tr. 77-87), a stipulation that the custom and practice of the disbursing office was to mail the checks on or about the date of the checks * (Tr. 1314-15), and testimony that the scheme itself envisioned the receipt of the checks through the mail at various addresses in New York City, as well as proof that the scheme succeeded, as planned. Under the standards set forth in *Robinson*, this evidence afforded a more than sufficient basis for the jury to find beyond a reasonable doubt that the checks had been mailed.

* Evidence of a routine practice is admissible to show the conduct of an organization on particular occasions was in conformity with that routine practice. Rule 306, Fed. R. Evid. See *United States v. Stevens*, 306 F.2d 834, 835 (5th Cir. 1962).

Finally, defendant Kevin Mangan argues that the mail fraud counts should be dismissed on the authority of *United States v. Henderson*, 386 F. Supp. 1048 (S.D. N.Y. 1974). This argument need not be considered if the concurrent sentence doctrine is applicable. Frank Mangan was sentenced to concurrent terms of imprisonment of two years on each of Counts 1-13. As to him, the concurrent sentence doctrine will obviate consideration of the *Henderson* argument if his conviction on any of Counts 1 or 7-13 is sustained. Kevin Mangan was sentenced to concurrent terms of imprisonment of one year and one day on each of Counts 1 (conspiracy), 2-4 (mail fraud), and 7-9 (false tax returns). Imposition of Kevin Mangan's sentence was suspended and he was placed on probation for three years, commencing upon release from his prison sentence, on each of Counts 5 and 6 (mail fraud) and 10-13 (false tax returns). Thus, the concurrent sentence doctrine will apply to Kevin Mangan's convictions on Counts 2-4 if any of his convictions on Counts 1 and 7-9 is sustained and to his convictions on Counts 5 and 6, if any of his convictions on Counts 10-13 is sustained.

The concurrent sentence doctrine provides that as a matter of discretion a federal appellate court may refuse to review the validity of convictions under remaining counts of a multi-count conviction when the conviction on one count was proper and concurrent sentences have been imposed. *Benton v. Maryland*, 395 U.S. 784 (1969); *United States v. Mejias*, 552 F.2d 435, 445 (2d Cir. 1977); *United States v. Hanlon*, 548 F.2d 1096, 1099 (2d Cir. 1977); *United States v. Gaines*, 460 F.2d 176 (2d Cir.), cert. denied, 409 U.S. 883 (1972). No claim of resulting collateral consequences has been made. *Benton v. Maryland*, 395 U.S. at 790 and n.5; *United States v. Mejias*, 552 F.2d at 445.

However, even if the concurrent sentence doctrine is not applied, there is no basis for dismissing the mail fraud

counts on the authority of *United States v. Henderson, supra*. In *Henderson*, Judge Weinfeld did dismiss mail fraud counts where the defendant was charged also with tax evasion. However, the facts of this case differ fundamentally from the facts in *Henderson*. In *Henderson* the taxpayer was charged with tax evasion by means of false statements in his own tax returns. The fraud in this case is of a wholly different nature. Defendants defrauded the government of cash by filing totally spurious returns. The returns did not reflect the true names, the true addresses or the true tax circumstances of the defendants.

The decision in *Henderson* did not purport to upset the well-established rule that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied in determining whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. *Blockburger v. United States*, 284 U.S. 299, 304 (1932). Under this test, the required proof of mailing makes the offenses under Title 18, United States Code, Section 1341 separate and distinct from the offenses under Title 26, United States Code, Section 7206.

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

State of New York)

County of New York)

ss.:

JAMES P. LAVIN being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District
of New York.

That on the 19th day of December, 1977
he served a copy of the within Appellee's Brief
2 copies each
by placing the same in a properly postpaid franked
envelope addressed:

Martin Erdmann, Esq.
The Legal Aid Society
Federal Defender Services Unit
509 United States Courthouse
Foley Square
New York, New York 10007

Lawrence Stern, Esq.
11 Monroe Place
Brooklyn, New York 11201

(Attorney for Appellant
Frank Mangan)

(Attorney for Appellant
Kevin Mangan)

And deponent further says that he sealed the said
envelope and placed the same in the mail box for mailing
at One St. Andrew's Plaza, Borough of Manhattan, City of
New York.

James P. Lavin

JAMES P. LAVIN

Sworn to before me this

19th day of December, 1977.

Alma Hanson

ALMA HANSON
NOTARY PUBLIC, State of New York
No. 24-6763450 Qualified in Kings Co.
Commission Expires March 30, 1978